Re Hairulzam bin Mohamad; ex parte Malayan Banking Bhd

HIGH COURT (SHAH ALAM) — BANKRUPTCY NO BA-29NCC-3040–12 OF 2022
AZMI ARIFFIN J
28 MARCH 2023

Bankruptcy — Bankruptcy notice — Filing of — Senior assistant registrar cancelled issuance of bankruptcy notices because amount less than RM100,000 — Whether there was requirement of minimum amount to file bankruptcy notice — Whether requirement of minimum amount of RM100,000 only applicable at creditor's petition stage — Insolvency Act 1967 ss 3(1)(i) & 5

The present appeals were filed by the judgment creditor ('the JC') against the decisions of the senior assistant registrar in dismissing the JC's request for issuance of two separate bankruptcy notices. The senior assistant registrar had rejected and cancelled the issuance of the bankruptcy notices because the amount stated in both bankruptcy notices were less than RM100,000. The issue arose was whether the two separate bankruptcy notices could be filed and there be a joinder of the two bankruptcy notices at the creditor's petition stage.

Held, allowing the appeals with no order as to costs and setting aside the decisions of the learned senior assistant registrar:

(1) The simultaneous filing of the two bankruptcy notices by the JC could be filed for any amount pursuant to s 3(1)(i) of the Insolvency Act 1967 if a creditor had obtained a final judgment or final order against a debtor for any amount and the execution thereon not having been stayed. More so when it was proven to the Bankruptcy Registry that the judgment debtor ('the JD') in the present case owed a combined or aggregate debt of more than RM100,000 at the time of filing the separate bankruptcy notices against the same JD under the separate judgments which would then be served on the same JD in two separate bankruptcy notices and be joined in one creditor's petition thereafter. The RM100,000 threshold was only applicable at the creditor's petition stage pursuant to s 5 of the Insolvency Act 1967 and not at the bankruptcy notice level (see para 11).

[Bahasa Malaysia summary

Rayuan-rayuan semasa difailkan oleh pemiutang penghakiman ('PP') terhadap keputusan penolong kanan pendaftar yang menolak permohonan PP untuk mengeluarkan dua notis kebankrapan berasingan. Penolong kanan pendaftar telah menolak dan membatalkan pengeluaran dua notis kebankrapan tersebut kerana jumlah yang dinyatakan dalam kedua-dua notis kebankrapan adalah

kurang daripada RM100,000. Isu yang timbul ialah sama ada dua notis kebankrapan yang berasingan boleh difailkan dan penggabungan dua notis kebankrapan tersebut di peringkat petisyen pemiutang.

Diputuskan, membenarkan rayuan-rayuan tanpa perintah berkaitan kos dan mengenepikan keputusan-keputusan penolong kanan pendaftar yang bijaksana:

(1) Pemfailan serentak kedua-dua notis kebankrapan tersebut oleh PP boleh difailkan untuk apa-apa jumlah menurut s 3(1)(i) Akta Insolvensi 1967 jika pemiutang telah memperoleh penghakiman muktamad atau perintah muktamad terhadap penghutang untuk apa-apa jumlah dan pelaksanaan ke atasnya tidak ditangguhkan. Lebih-lebih lagi apabila dibuktikan kepada Daftar Kebankrapan bahawa penghutang penghakiman ('HP') dalam kes ini berhutang dengan jumlah gabungan atau agregat lebih daripada RM100,000 pada masa memfailkan notis kebankrapan yang berasingan terhadap HP yang sama di bawah penghakiman berasingan yang kemudiannya akan disampaikan kepada HP yang sama dalam dua notis kebankrapan yang berasingan dan setelah itu digabungkan dalam satu petisyen pemiutang. Ambang RM100,000 hanya terpakai pada peringkat petisyen pemiutang menurut s 5 Akta Insolvensi 1967 dan bukan pada peringkat notis kebankrapan (lihat perenggan 11).]

Cases referred to

A Debtor (No 20 of 1953), Re; Ex parte The Debtor v Scott and Another [1954] 3 All ER 74, CA (refd)

Debtors, In re [1927] 1 Ch 19, CA (refd)

Hong Leong Bank Bhd v Khairulnizam bin Jamaludin [2016] 4 MLJ 302, FC (refd)

Michael Chong Ngian Fong v Syarikat Fong Sam Timber & Anor [1977] 1 MLJ 263 (refd)

Legislation referred to

Insolvency Act 1967 ss 3(1), (1)(i), (2), 5, 5(1)(a), 91
Insolvency Rules 2017 rr 89, 90, Forms 34, 35

(CH Yeap Maluda Cheh) for the judgment creditor.
Hairulzam bin Mohamad judgment debtor.

Azmi Ariffin J:

INTRODUCTION

[1] There are two ex parte appeal filed before this honourable court for me to decide. They are as follows:

(a) BA-29NCC-3040–12 of 2022:

(i) encl 4 dated 27 December 2022 is the judgment creditor (Malayan Banking Bhd) notice of appeal to the judge in chambers against the learned senior assistant registrar's decision delivered on 23 December 2022 dismissing the judgment creditor request for issuance of bankruptcy notice (encl 1) and bankruptcy notice (encl 2) filed on 9 December 2022.

(b) BA-29NCO3041–12 of 2022:

(i) encl 4 dated 27 December 2022 is the judgment creditor (Maybank Islamic Bhd) notice of appeal to the judge in chambers against the learned senior assistant registrar's decision delivered on 23 December 2022 dismissing the judgment creditor request for issuance of bankruptcy notice (encl 1) and bankruptcy notice (encl 2) filed on 9 December 2022.

[2] To facilitate the determination of these two separate appeals, I find it more convenient to decide both the appeals in a single judgment as they are interrelated.

BACKGROUND FACTS

[3] Let me start with encl 4 (BA-29NCC-3040–12 of 2022):

(a) on 3 June 2020, the judgment creditor (Malayan Banking Bhd) has obtained an amended judgment in default against the first defendant (judgment debtor) and second defendant (Nurulhuda bt Esa) at the Magistrate Court Shah Alam, Suit No BA-A72NCC-75–01 of 2020 where both the defendants were ordered to jointly and severally pay a sum of RM29,869.52 including interest and costs to the judgment creditor;

(b) on 9 December 2022, the judgment creditor filed request for issuance of bankruptcy notice (encl 1) and bankruptcy notice (encl 2) against the judgment debtor for a total amount of RM34,184.70 (as at 9 December 2022);

(c) on 23 December 2022, the learned senior assistant registrar rejected and cancelled the issuance of the said bankruptcy notice on the ground that

the amount stated in the bankruptcy notice is less than RM100,000,00 at the date of the filing of the bankruptcy notice; and

(d) dissatisfied with the decision delivered by the learned senior assistant registrar, on 27 December 2022, the judgment creditor filed the present notice of appeal to the judge in chamber in encl 4.

[4] Moving now to encl 4 (BA-29NCC-3041–12 of 2022):

(a) on 17 June 2020, the judgment creditor (Maybank Islamic Bhd) has obtained an amended judgment in default against the first defendant (judgment debtor) and second defendant (Nurulhuda bt Esa) at the Magistrate Court Shah Alam, Suit No BA-A72M-31–01 of 2020 where both the defendants was ordered to jointly and severally pay a sum of RM72,224.36 including interest and costs to the judgment creditor;

(b) on 9 December 2022, the judgment creditor filed request for issuance of bankruptcy notice (encl 1) and bankruptcy notice (encl 2) against the judgment debtor for a total amount of RM68,237.89 (as at 9 December 2022);

(c) on 23 December 2022, the learned senior assistant registrar rejected and cancelled the issuance of the said bankruptcy notice after it has been extracted on the same ground that the amount stated in the bankruptcy notice is less than RM100,000 at the date of the filing of the bankruptcy notice; and

(d) dissatisfied with the decision delivered by the learned senior assistant registrar, on 27 December 2022, the judgment creditor filed the present notice of appeal to the judge in chamber in encl 4.

[5] So much for the factual background.

THE RELEVANT PROVISION OF LAW

[6] The provision of the law cited are as follows:

(a) s 3(1) of the Insolvency Act 1967:

> 3 Acts of bankruptcy
>
> (1) A debtor commits an Act of bankruptcy in each of the following cases:
>
> (i) If a creditor has obtained a final judgment or final order against him for any amount and execution thereon not having been stayed has served on him in Malaysia, or by leave of the court elsewhere, a bankruptcy notice under this Act requiring him to pay the judgment debt or sum ordered to be paid in accordance with the terms of the judgment or order with interest quantified up to the date of issue of the bankruptcy notice, or to secure or compound for it to the satisfaction of the

creditor or the court; and he does not within seven days after service of the notice in case the service is effected in Malaysia, and in case the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the court that he has a counterclaim, set off or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid and which he could not set up in the action in which the judgment was obtained or in the proceedings in the order was obtained.

(b) s 5(1)(a) of the Insolvency Act 1967:

Conditions on which creditor may petition

(1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless —

(a) the debt owing by the debtor to the petitioning creditor, or if two or more creditors join in the petition the aggregate amount of debts owing to the several petitioning creditors, amounts to one hundred thousand ringgit;

(c) s 91 of Insolvency Act 1967:

91 General power of bankruptcy courts

(1) Subject to this Act, the court, under its jurisdiction in bankruptcy, shall have full power to decide all questions of priorities and all other questions whatsoever, whether of law or fact, which may arise in any case of bankruptcy coming within the cognizance of the court, or which the court deems it expedient or necessary to decide for the purpose of doing complete justice or making a complete distribution of property in any such case.

(2) Where default is made by a debtor or other person in obeying any order or direction given by the court, or given by the Director General of Insolvency, or any other officer of the court, under any power conferred by this Act, the court may, on the application of the Director General of Insolvency or other duly authorized person, or of its own motion, order such defaulting debtor or person to comply with the order or direction so given, and may also, if it thinks fit, make an other person.

(3) The power given by subsection (2) shall be deemed to be in addition to and not in substitution for any other right or remedy in respect of such default.

(d) r 89 of the Insolvency Rules 2017:

89 What court to issue

(1) A bankruptcy notice shall be issued by the court in which a bankruptcy petition against the debtor may subsequently be filed.

(2) A creditor is not entitled to apply for the issue of a bankruptcy notice by combining two or more final judgments or final orders.

(3) A creditor is not entitled to apply for the issue of a bankruptcy notice against joint debtors in a final judgment or final order unless the debtors had carried on business jointly. If the debtors had not carried on business jointly application should be made for the issue of a separate bankruptcy notice against each debtor in the final judgment or final order.

(4) In the case of a final judgment or final order against a partnership and if the individual partners were not served with the writ of summons in the suit in which the final judgment or final order was obtained, the final judgment or final order cannot be used to found a bankruptcy notice against a partner without leave of the court.

(e) r 90 of the Insolvency Rules 2017:

90 Issue of notice

(1) When applying for the issue of a bankruptcy notice, the creditor shall —

(a) produce to the Registrar an office copy of the judgment or order on which the notice is founded;

(b) produce to the Registrar a copy of originating summon or writ of summon on which the notice is founded:

(c) produce to the Registrar a copy of agreement on which a judgment or order is made against a debtor:

(d) file the notice, together with a request for issue; and

(e) lodge sufficient number of copies of the bankruptcy notice to be sealed and issued for service.

(2) If the creditor fails to comply with the requirements of this rule, the court shall reject the application.

FINDINGS OF THIS COURT

[7] Before I turn to the findings of this honourable court, I find it necessary to begin by examining the various cases cited by the learned counsels for the judgment creditors.

[8] On the critical issue of whether two separate bankruptcy notices can be filed and there be a joinder of the two bankruptcy notices at the creditor's petition stage, the High Court in *Michael Chong Ngian Fong v Syarikat Fong Sam Timber & Anor* [1977] 1 MLJ 263 has held as follows:

> Under s 3(1)(i) of the Bankruptcy Act 1967 a bankruptcy notice may be issued against a debtor at the instance of one and only one creditor on a final judgment or final order. I think there could have been no objection to the bankruptcy notice if it had been issued by only one of the two creditors based on the amount of money due to that creditor in the judgment of April 21, 1975 but the issue of the bankruptcy notice jointly by both the judgment creditors rendered the notice bad and irregular.

The bankruptcy petition which follows after a debtor has committed an act of bankruptcy is on a different footing. The bankruptcy petition unlike the bankruptcy notice may be presented to the court by one or two or more creditors under s 5(1)(a) of the Bankruptcy Act. This section and the form in the Appendix to the Bankruptcy Act relating to a creditor's petition provide for the presentation of the petition by one or several creditors while s 3(1)(i) and the forms prescribed for the issue of a bankruptcy notice and the request for the issue of a bankruptcy notice speak of only one creditor. The provisions of s 3(1)(i) and s 5(1)(a) of the Bankruptcy Act, r 91 (2) and (3) of the Bankruptcy Rules and the relevant forms prescribed in the Appendix to the Act are to be construed literally. Thus, they can mean only what is said therein, namely, that a bankruptcy notice is to be issued by only one creditor against one debtor or against joint debtors if they had carried on business jointly based on one final judgment or final order but that one or several creditors may join in presenting a bankruptcy petition against a debtor who has committed an act of bankruptcy.

[9] *In re Debtors* [1927] 1 Ch 19 the Court of Appeal in England held as follows:

Statement in *Williams' Bankruptcy Practice*, 13th ed, p 42, that 'By what may be called the Common Law of Bankruptcy, it has always been held that the petitioning creditor's debt must have accrued due before the act of bankruptcy on which it is intended to found the petition (*Moss v Smith*, 1 Camp 489); but the debt need bankruptcy' approved of as a correct statement of the law.

[10] This is further reaffirmed in *Re A Debtor (No 20 of 1953); Ex parte The Debtor v Scott and Another* [1954] 3 All ER 74 at p 5 where the passage from *Williams' Bankruptcy Practice* (13th Ed) p 42 was followed verbatim:

By what may be called the common law of bankruptcy, it has always been held that the petitioning creditor's debt must have accrued due before the act of bankruptcy on which it is intended to found the petition: *Moss v Smith*; but the debt need not have been due to the petitioning creditor at the date of the act of bankruptcy.

[11] In view of the above authorities, it is my considered view that the simultaneous filing of the two bankruptcy notice by the judgment creditors can be filed for any amount pursuant to s 3(1)(i) of the Insolvency Act 1967 if a creditor has obtained a final judgment or final order against a debtor for any amount and execution thereon not having been stayed. More so when it is proven to the bankruptcy registry that the judgment debtor here owed a combined or aggregate debt of more than RM100,000 at the time of filing the separate bankruptcy notices against the same judgment debtors under the separate judgments which will then be served on the same judgment debtor in two separate bankruptcy notices and be joined in one creditor's petition thereafter. The RM100,000 threshold is only applicable at the creditor's petition stage under s 5 of the Insolvency Act 1967 and not at the bankruptcy notice level.

[12] it must also be emphasised that s 5 of the Insolvency Act 1967 deals with creditor's petition and under the heading of 'Bankruptcy Order'. Thus, it is in my view that all the requirements laid down under s 5 of the Insolvency Act 1967, including the RM100,000 minimum threshold, are meant to be satisfied at the creditor's petition stage.

[13] The issuance of a bankruptcy notice on the other hand is pursuant to s 3(2) of the Insolvency Act 1967 which provides that the bankruptcy notice shall be issued in the prescribed form (specifically Form 34 of the Insolvency Rules 2017) and shall state the consequences of non-compliance therewith and shall be served personally to a debtee. It is pertinent to note that in the said Form 34 and Form 35 (Request for Issue of Bankruptcy Notice), a creditor is not required to state that he has complied with the requirements of s 5 of the Insolvency Act. At the same time there is nothing in the Insolvency Act 1967 nor the Insolvency Rules 2017 to say that the debt must be above the minimum threshold of RM100,000 before a bankruptcy notice is issued by the court.

[14] There are certain formalities to be observed when filing the bankruptcy notice. It must be accompanied by a request to the registrar to issue a bankruptcy notice. The bankruptcy notice is dated by the registrar and sealed. There must be an endorsement upon the notice stating that if the debtor has any set off, counterclaim or cross-demand, he must file an affidavit to that effect. After those formalities are complied with by the creditor, the court is required to issue the bankruptcy notice.

[15] Having said that, I am unable to agree that there exists the requirement of RM100,000 minimum thresholds for a bankruptcy notice to be issued when the statute has not provided so, especially when the other requirements for the issuance of a bankruptcy notice are being laid down all the while. If the Legislature has so intended, one would expect it to have spelt out that requirement in an express and clear provision to that effect, what more when it involves such an important requirement. I also believe that I am not at liberty to simply ignore the explicit provision of s 5(1)(a) of the Insolvency Act where the word 'bankruptcy petition' is used instead of 'bankruptcy action' or 'bankruptcy proceeding'. Where the language used is clear and unambiguous, it is not the function of the court to re-write the statute in a way which it considers reasonable. Thus, I once again reiterate that the RM100,000 minimum threshold is only applicable at the creditor's petition stage and not at the bankruptcy notice level.

[16] My findings above are in line with the decision made by the Federal Court in the case of *Hong Leong Bank Bhd v Khairulnizam bin Jamaludin* [2016] 4 MLJ 302, where it was held that:

> [25] The issuance of a bankruptcy notice in Form 5 is pursuant to s 3(2) of the Act

and r 91 of the Rules 1969. It is pertinent to note that in Forms 4 and 5 of the Rules 1969 a creditor is not required to state that he has complied with the requirement of s 5(3) of the Act. At the same time there is nothing in the Act or the Rules 1969 to say that leave must first be obtained before a bankruptcy notice is issued by the court.

...

[28] With respect, we are unable to agree with the decision of the courts below. If the Legislature has so intended one would expect it to have spelt out that requirement in an express and clesrprovision to that effect. Such as important requirement cannot, in our view, be inferred from the words used in s 5(3) of the Act. We are not at liberty to brush aside the explicit provisions of s 5(3) of the Act and r 92 of the Rules 1969, There is nothing to say that leave must first be obtained by the creditor before a bankruptcy notice is applied.

[29] In interpreting the provisions of a statute, one of the cardinal rules is to adhere as closely as possible to the literal meaning of the words. The duty of the court is limited to interpreting the words used the language used is clear and unambiguous, it is not the function of the court to re-write the statute in a way which it considers reasonable ...

...

[31] It is pertinent to note that s 5 of the Act deals with creditor's petition and under the heading of 'Receiving Order'. Section 6(1) of the Act provides that a creditor's petition shall be verified by affidavit of the creditor or of some person on his behalf having knowledge of the facts. Section 6(2) of the Act provides that at the hearing of the creditor's petition the court may make a receiving order in pursuance of the petition.

[32] On a proper reading of ss 5 and 6 of the Act we are of the view that a creditor has to satisfy the court at the hearing of the creditor's petition that the creditor has exhausted all avenues to recover debts owed to him by the debtor. This can be done by way of an affidavit pursuant to s 6(1) of the Act Furthermore at this stage the court is required to make a judicial decision on the creditor's petition. On the other hand, when the court issued a bankruptcy notice pursuant to r 91 of the Rules 1969 the procedure is more administrative in nature.

CONCLUSION

[17] Having appraised myself of the relevant provisions of the law, the documentary evidence before me, the oral and written submission made by the learned counsels for the judgment creditors, I am in no hesitation to conclude that the two separate appeals filed by the judgment creditors in encl 4 have merits and must certainly be allowed.

[18] No order as to cost.

[19] The decision of the learned senior assistant registrar in both encl 4 is hereby set aside.

Appeals allowed with no order as to costs; decisions of learned senior assistant registrar set aside.

Reported by Dzulqarnain Ab Fatar